

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CYNTHIA DARRINGTON, *et al.*,

11 Plaintiffs, CASE NO. C13-0286-JCC  
12 v.  
13 ASSESSMENT RECOVERY OF  
14 Defendants. ORDER  
15 WASHINGTON, LLC, *et al.*,

16 This matter comes before the Court on the parties' joint motion for class notice (Dkt. No.  
17 57), Plaintiffs' motion for summary judgment (Dkt. No. 58), and Plaintiffs' motion to compel  
18 mediation (Dkt. No. 59). Having thoroughly considered the parties' briefing and the relevant  
19 record, the Court hereby GRANTS the joint motion for class notice as explained herein;  
20 DENIES Plaintiffs' motion for summary judgment without prejudice to re-filing once the class  
21 has received notice and had an opportunity to opt out of this case; and DENIES Plaintiffs'  
motion to compel mediation.

22 **I. BACKGROUND**

23 This matter is a class action lawsuit in which Plaintiffs Cynthia Darrington, Johanna  
24 Smith, and James McAdam allege that Defendants violated the Fair Debt Collection Practices  
25 Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.*; the Washington Collection Agency Act ("WCAA"),  
26 Wash. Rev. Code §§ 19.16.110–240; and the Washington Consumer Protection Act ("WCPA"),

1 Wash. Rev. Code §§ 19.86.010–920. (See Dkt. No. 53.) Plaintiffs are condominium owners from  
2 whom Assessment Recovery of Washington, LLC (“ARW”) attempted to or did collect unpaid  
3 monthly assessments owed to condominium owners’ associations and an allegedly unlawful 35  
4 percent collection fee. Plaintiffs name as defendants ARW; Assessment Recovery, Limited;  
5 Escape Velocity Enterprise Limited; and the owner of each of these entities, Darron Hay. (*Id.* at  
6 ¶¶ 4.1–4.7.) The Court previously certified an Umbrella Class and two sub-classes. (Dkt. No.  
7 55.) When the classes were certified, the Court directed the parties to jointly submit a proposed  
8 notice that would be sent to class members.

9 The Court now has before it three motions. The first is the parties’ joint motion for class  
10 notice, in which the parties present the proposed Class Notice and method for dissemination.  
11 (Dkt. No. 58.) The second motion, filed contemporaneously with the joint motion for class  
12 notice, is Plaintiffs’ motion for partial summary judgment as to Defendants’ liability. (Dkt. No.  
13 58.) And finally, Plaintiffs filed contemporaneously a motion to compel Defendants to  
14 participate in a private mediation. (Dkt. No. 59.) The Court considers each motion in turn.

## 15 **II. DISCUSSION**

### 16 **A. Joint Motion for Class Notice**

17 In accordance with this Court’s class certification order, the parties submitted a joint  
18 motion for approval of form and dissemination of class notice. (Dkt. No. 57.) The parties agree  
19 on the content of the proposed class notice and that the notice should be mailed to each  
20 individual class member using their last known address. (*Id.* at 3.) However, they dispute  
21 whether the class notice should also be provided to condominium owners’ associations  
22 (“COAs”). Plaintiffs argue that sending the notice to class members’ COAs, as well as mailing  
23 the notice to individual class members, will ensure that notice is provided to class members  
24 whose names were not included in Defendants’ records or who may not receive the notice in the  
25 mail. (*Id.* at 4.) Defendants explain that it is speculative to believe that there are class members  
26 who were not included in their comprehensive internal database; that the COAs are under no

1 obligation to further disseminate the notice; that notification of the lawsuit and its allegations  
2 may be disparaging to the COAs, which individual condominium owners may fault for their  
3 decisions to work with Defendants; and that notifying COAs of the allegations could be  
4 disparaging to Defendants. (*Id.*)

5 The Court has reviewed the parties' motion and finds the proposed class notice and  
6 method of distribution to be in accord with Rule 23's requirements. *See Fed. R. Civ. P.*  
7 23(c)(2)(B) (requiring best notice that is practicable under the circumstances and establishing  
8 specific notice requirements for classes certified under Rule 23(b)(3)); *Eisen v. Carlisle &*  
9 *Jacquelin*, 417 U.S. 156, 175–76 (1974) (notice must be mailed to individual class members  
10 where class member can be identified through reasonable effort); *accord Bensinga v. United*  
11 *States*, 923 F.2d 133, 136 (9th Cir. 1991). The Court agrees with Defendants that the class notice  
12 need not be sent to the COAs, however, as the COAs would be under no obligation to further  
13 disseminate the notice and Plaintiffs have offered no reason to believe that there are additional  
14 class members beyond those listed in Defendants' internal records. The Court approves the  
15 notice and distribution method as proposed with the exception that it need not be provided to the  
16 individual COAs.

17 Accordingly, the Court hereby ORDERS:

18 1. On November 13, 2013, the Court has certified a class, referred to as the  
19 "Umbrella Class" as follows:

20 All consumers who purchased a condominium for personal use or residential use  
21 in the state of Washington and who were sent a collection demand by Defendants  
22 and/or had a lien placed on their property by Defendants for amounts that  
23 included collection fees, interest, or costs which had not been incurred by  
Defendants' clients, homeowners' or condominium associations.

24 The Court also certified two separate sub-classes, the "FDCPA Sub-Class" and the  
25 "WCAA/WCPA Sub-Class." These sub-classes are defined as follows:

26 **FDCPA Subclass:** All members of the Umbrella Class from whom Defendants  
attempted to collect, or collected money from after September 4, 2011.

1           *WCAA/WCPA Subclass:* All members of the Umbrella Class from whom  
2 Defendants collected money or recorded a lien against the member's property  
3 after September 4, 2008.

4           2. The Court approves, as to form and content, the class notice attached as Exhibit A  
5 to the Parties' Joint Motion for Approval of Form and Dissemination of Class Notice. (Dkt. No.  
6 57, Ex. A.)

7           3. The Court finds that the mailing and distribution of the class notice substantially  
8 in the manner and form set forth in paragraphs four and five below, constitutes the best notice  
9 practicable under the circumstances, including individual notice to all class members, and  
10 constitutes valid, due, and sufficient notice to all persons entitled thereto, complying fully with  
11 the requirements of Fed. R. Civ. P. 23 and due process.

12           4. Notice shall be disseminated by Plaintiffs in the following manner:

- 13           • Garden City Group ("GCG"), a class action administration service, will  
14 disseminate notice to all class members.
- 15           • The class notice will be mailed to the last known address of class members.  
16           The last known address will be determined through Defendants' records and  
17           by utilizing the National Change of Address Database prior to the initial  
18           mailing.
- 19           • For any returned mail received within 60 days of the initial mailing of the  
20           class notice, GCG will run an advanced address search. If the advanced  
21           address search returns a new address, the class notice will be re-mailed to the  
22           new address.
- 23           • Class members will have 90 days from the date of mailing to opt out. The  
24           class notice provides instructions to class members on how to opt out of the  
25           class. The opt out process simply requires that absent class members send a  
26           signed request to opt-out to class counsel, which references the litigation,

1 states the class member's name, address, and phone number, states that the  
 2 person is a class member, and contains a statement that the class member  
 3 wishes to opt out. If a class member's notice is returned as undeliverable,  
 4 they shall have 90 days from the date the notice is re-sent to the new address  
 5 to opt out.

6 5. Notice will be disseminated consistent with the following schedule:

7 Notice mailed to class members	8 Within 15 days after Order 9 Granting Joint Motion for Approval of Form and Dissemination of Class Notice is entered by the Court
10 Last day for class members to opt out	11 90 days from date of mailing if mail not returned as undeliverable 12 13 90 days from date of re-mailing if original notice returned as undeliverable

14 6. Plaintiffs shall file with the Court a declaration or affidavit of the mailing  
 15 consistent with paragraphs four and five above.

16 **B. Plaintiffs' Motion for Summary Judgment**

17 The Court also has before it Plaintiffs' motion for partial summary judgment, which was  
 18 filed contemporaneously with the joint motion for class notice. (Dkt. No. 58.) Plaintiffs seek a  
 19 ruling as to Defendants' liability under the FDCPA, WCPA, and WCAA. In the motion,  
 20 Plaintiffs argue that the Court may appropriately consider the motion even though the class  
 21 members have not yet received notice because Defendants implicitly waived protection under the  
 22 "one way intervention rule" when, earlier in the litigation, they suggested that the parties file  
 23 cross-motions for summary judgment. Defendants oppose Plaintiffs' motion. They assert, *inter*  
 24 *alia*, that consideration of Plaintiffs' summary judgment motion would deprive them of the one-  
 25 way intervention rule's protection. They further argue that merely suggesting cross-motions for  
 26 summary judgment early in the case to avoid the cost of additional litigation is not a *per se*

1 waiver of the one-way intervention rule's protection, especially where those cross motions were  
 2 not actually filed and the Court has already certified the class (but not yet provided notice).

3 It is well established that "district courts generally do not grant summary judgment on the  
 4 merits of a class action until the class has been properly certified and notified." *Schwarzschild v.*  
 5 *Tse*, 69 F.3d 293, 295 (9th Cir. 1995); *see Gomez v. Rossi Concrete, Inc.*, No. C08-1442, 2011  
 6 WL 666888, at \*1 (S.D. Cal. Feb. 17, 2011) ("Absent extraordinary circumstances, it is  
 7 appropriate to postpone ruling on a plaintiff's motion for summary judgment until after class  
 8 definition issues are settled, notice has been given, and the period for class members to exclude  
 9 themselves has expired[.]"). The "one way intervention" rule, embodied in Federal Rule of Civil  
 10 Procedure 23(c)(2), exists to "prevent the intervention of a plaintiff in a class action after an  
 11 adjudication favoring the class ha[s] taken place[, since] the plaintiff would not otherwise be  
 12 bound by an adjudication in favor of the defendant." *Geselle v. Jack in the Box, Inc.*, No. C10-  
 13 0960, 2012 WL 3686274, at \*3 (D. Or. Aug. 24, 2012) (quotations omitted); *Khasin v. Hershey*  
 14 Co., No. C12-1862, 2014 1779805, at \*2 (N.D. Cal. May 5, 2014) ("The doctrine is 'one-way'  
 15 because a plaintiff would not be bound by a decision that favors defendant, but could decide to  
 16 benefit from a decision favoring the class.") If a defendant files his own motion for summary  
 17 judgment before the class is certified and notice is provided, however, he waives "any right to  
 18 compel the plaintiff to notify the class of the pending action." *Schwarzschild*, 69 F.3d at 295.

19 A ruling on Plaintiffs' summary judgment motion is premature and, if rendered, would  
 20 prejudice Defendants. While the Court has certified the class, notice has not yet been provided to  
 21 class members. Providing a ruling as to Defendants' liability before class notice could well  
 22 present the very situation Rule 23(c)(2) and the one-way intervention rule are meant to  
 23 preclude—namely, if the Court were to address the parties' summary judgment motion and rule  
 24 in Defendants' favor, that ruling would not bind the class members who had not received notice

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1 and an opportunity to opt out of the lawsuit beforehand.<sup>1</sup> Finally, the Court notes that a decision  
 2 on Plaintiffs' summary judgment motion will not significantly delay the case or result in  
 3 unnecessary expenditure since the class is already certified and the only step that remains to be  
 4 completed before considering the summary judgment motion is class notification.

5 While courts have discretion to rule on a summary judgment motion before class  
 6 certification and notification, under certain circumstances, they generally exercise that discretion  
 7 only when a defendant consents to the procedure or otherwise waives their objection to a pre-  
 8 notification ruling. Here, Defendants expressly object to Plaintiffs' summary judgment motion  
 9 and invoke the one-way intervention rule. While they may have suggested cross-motions for  
 10 summary judgment earlier in the case, the Court does not find such an action to constitute a  
 11 waiver where Defendants did not, in fact, file a motion for summary judgment and do not  
 12 affirmatively consent to consideration of the motion in their current briefing. Accordingly, the  
 13 Court denies Plaintiffs' motion for summary judgment without prejudice to re-filing once class  
 14 notice is provided and the period for class members to opt out has expired.

15 **C. Plaintiffs' Motion to Compel Mediation**

16 Finally, Plaintiffs seek to compel Defendants and their insurance carrier to participate in a  
 17 private mediation under Local Rule 39.1 and Federal Rule of Civil Procedure 16. Plaintiffs argue  
 18 that Defendants have, in bad faith, "instructed [] counsel to engage in protracted and unnecessary  
 19 litigation in an attempt to intentionally exhaust the eroding policy under which [Defendants are]  
 20 insured." (Dkt. No. 59.) Defendants Assessment Recovery of Washington, LLC, Assessment  
 21 Recovery Limited, and Darron Hay, oppose Plaintiffs' request. They state that they are "electing  
 22 not to settle because [they] seek[] a determination on the merits of plaintiffs' claim[,]” and  
 23 explain that a finding that their collection practices are lawful will assist in the recovery of  
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25 <sup>1</sup> In reaching this conclusion, the Court expresses no position on the merits of Plaintiffs' summary  
 26 judgment motion. Instead, it merely notes that it is premature to reach the issue and decides that the safer course of  
 action, for all parties involved, is to postpone ruling on the merits until class members have received notice and an  
 opportunity to opt out of the lawsuit.

1 unpaid fees from clients who declined to make payments in light of this lawsuit. (Dkt. No. 61.)  
2 Defendants further state that the nefarious motives Plaintiffs attribute to them do not actually  
3 drive their desire to litigate, as they merely seek to have their day in Court so that they may  
4 receive a dispositive ruling—an outcome that settlement cannot offer. (*Id.*)

5 The Court declines to require the parties to mediate at this stage of the proceedings. The  
6 Court has the authority to require mediation, even over a parties' objection, where doing so could  
7 yield significant benefits. Local Rules W.D. Wash. CR 39.1(a)(4) (participation in ADR is  
8 voluntary unless court orders parties to participate); *see EEOC v. Evans Fruit Co., Inc.*, 872  
9 F.Supp.2d 1107, 1116 (E.D. Wash. 2012). However, ARW, ARL, and Mr. Hay have made clear  
10 that they do not wish to mediate or otherwise settle this lawsuit absent a ruling as to the  
11 dispositive legal question from this Court. Requiring mediation, in the Court's view, will serve  
12 no real purpose other than increasing the amount of attorneys' fees expended by all parties.  
13 Because the class is already certified, notice will soon be sent to class members, and the Court  
14 will soon rule on summary judgment motions (in accordance with the timeline established  
15 herein), the Court believes that the better course is to allow the litigation to proceed in the most  
16 efficient manner possible. Requiring mediation over Defendants' vehement objection and  
17 effective guarantee that they will not settle this matter will not serve that purpose.

18 The Court notes, however, that it previously vacated the status conference in this matter.  
19 Now that class notice will be provided and the pending motions have been resolved, the parties  
20 are directed to file a status report after the opt-out period has concluded that contains the parties'  
21 proposed case management dates. The Court will then set a status conference at that time and  
22 determine whether mediation would be useful to the parties.

23 **III. CONCLUSION**

24 For the foregoing reasons, the parties' joint motion for class notice (Dkt. No. 57) is  
25 GRANTED; Plaintiffs' motion for summary judgment is DENIED without prejudice; and  
26 Plaintiffs' motion to compel mediation is DENIED.

DATED this 5th day of August 2014.

John C. Coughenour

John C. Coughenour  
UNITED STATES DISTRICT JUDGE